

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Annapolis Valley Peat Moss Co Ltd v. Barone Monti Trading Inc, cob
Monti Peat Moss, 2004 NSSC 229

Date: 20041109

Docket: S.AR. No. 209271

Registry: Annapolis Royal

Between:

Annapolis Valley Peat Moss Company Ltd

Plaintiff

v.

Barone Monti Trading Inc., in its own name and carrying on business under the
style and name of Monti Peat Moss

Defendant

Judge: The Honourable Justice Gregory M. Warner

Heard: October 26, 2004, in Annapolis Royal, Nova Scotia
Last submission received October 29, 2004.

Counsel: Gary A. Richard, Esq., counsel for the Applicant

Ronald D. Richter, Esq., counsel for the Plaintiff

No one representing the defendant

By the Court:

BACKGROUND

[2] On October 22, 2003, the plaintiff, a dealer in peat moss, sued the defendant for the value of peat moss sold to the defendant and not paid for.

[3] On December 16, 2003, the court issued an order for substituted service on the defendant and service was effective on January 15, 2004.

[4] Default judgment was entered against the defendant for \$138,063.93 on April 13, 2004, and an execution order was issued and equipment situate at Maxwellton, Digby County, Nova Scotia, was seized under the execution order.

[5] Anthony DiFrancesco of Landenberg, Pennsylvania, carrying on business as DiFrancesco & Sons Mushroom, has applied under Civil Procedure Rules 53.08, 50.03 and 48.13 for a declaration that he, and not the defendant, is the owner of the seized equipment.

[6] In respect of this application six affidavits have been filed and all deponents were available for cross-examination at Annapolis Royal on October 26, 2004.

The plaintiff cross-examined Anthony DiFrancesco, (called third party) and Sergio Monticchio (President of the defendant). The third party did not cross-examine any of the four deponents whose affidavits were filed on behalf of the plaintiff; that is, Daniel Woodfield (president of Woody's Auctions Ltd); Beverley Woodfield (Vice-President of Woody's Auctions Ltd); Hector Boudreau (owner of the Maxwellton property on which the equipment was situate), or Henri Endres (President of the plaintiff).

ISSUE

[7] The only issue is whether the equipment situate at Maxwellton, Digby County, Nova Scotia, belonged to the defendant or the third party. The third party claimed that, while title to the equipment was held in the name of the defendant, the defendant had purchased the equipment as an agent for, and held it as trustee for, the third party under an oral purchase money resulting trust”.

THE FACTS

[8] Until 2002, Clare Organics Products Limited (called COP) operated a peat and organic compost business at Maxwelton, Digby County, Nova Scotia, on land and in a building owned by Henry Boudreau - one of the principals of COP. A creditor of COP caused the equipment owned by COP and situate in Boudreau's building to be sold at auction by Woody's Auction Limited on July 10, 2003.

[9] Daniel and Beverley Woodfield are the president and vice-president respectively of Woody's Auction Limited and they conducted the sale on July 10, 2003 at the premises of Hector Boudreau where the equipment was situate.

[10] The auction company requires all bidders to complete a registration form identifying the bidders, a copy of which form in relation to this action was attached to David Woodfield's affidavit. He filled in the name of the defendant on bidder form 76 with the address of the defendant in Richmond Hill, Ontario, on the instructions of V. Jaceslavs Golods (called Golods), who represented himself as agent for the defendant. He then turned over the bidder form to Beverley Woodfield to make arrangements for payment, including the deposit, in the event the defendant was the successful bidder.

[11] Beverley Woodfield's affidavit (upon which she was not cross-examined) states that she explained to Golods the terms and conditions of the auction, including the method of payment. She was provided with a Mastercard number of the third party, Anthony DiFrancesco, and she spoke to him on the telephone. He authorized a down payment of \$15,000.00 on his credit card.. Mr. DiFrancesco advised Beverley Woodfield that he was in the United States and could have the rest of the money wired to her and she advised that this would not be acceptable and that she required funds to be sent from a Canadian source and Mr. DiFrancesco indicated that he would arrange for this to happen.

[12] Paragraph 6 of her affidavit states:

Mr. DiFrancesco confirmed to me that Mr. Golods represented him at the auction. I do not recall whether he specified that was him personally or Barone Monti Trading Inc., however, I understood from the registration form that the bidder was Barone Monti Trading Inc., and I was not told otherwise by even Mr. DiFrancesco or Mr Golods.

[13] Mr. Golods was the successful bidder at the sale. The down payment was made on Mr. DiFrancesco's credit card. A short form invoice was made out to the defendant and later a long form invoice was made out to the defendant, both of which were received by Golods.

[14] On October 23, 2003, an employee of the defendant named “Kashmir” requested a clean copy of the original invoice in favour of the defendant and it was sent to the defendant.

[15] After the sale Beverley Woodfield received phone calls from Golods and from “Sergio” (who turned out to be Sergio Monticchio, the president of the defendant) with respect to making arrangements for the removal of the equipment from Mr. Boudreau's building and to ensure the security of the equipment.

[16] Her first contact from Mr. DiFrancesco (after the phone call during the auction) was the third week of July, 2004, followed shortly by a phone call from Sergio Monticchio requesting that the original invoice be changed from the defendant to Mr. DiFrancesco; she declined to do so .

[17] Attached to the affidavit of Henri Endres, president of the plaintiff, was a print out from the Minister of Consumer and Business Services in the Province of Ontario with respect to the defendant showing that it had only two directors, Sergio Monticchio and Anthony DiFrancesco and that Sergio Monticchio was the

president and Anthony DiFrancesco was secretary and there were no other officers. Mr. Endres swore that the equipment was seized by the sheriff on an execution order for the plaintiff in April, 2004.

[18] Hector Boudreau, the owner of the land and building in which the equipment was situate and one of the principals of COP attended a July 10th, 2003 auction. He spoke to Golods, the successful bidder who advised Mr. Boudreau that he represented the defendant and who gave Mr. Boudreau the name of Sergio (Monticchio) as the contact for the defendant. He made no mention of Anthony DiFrancesco. Mr. Boudreau's affidavit states that Golods advised Boudreau to contact either Golods or Sergio (Monticchio) with regards to any questions about arrangements to remove the equipment from the building. Boudreau's affidavit states that he spoke by telephone with Sergio (Monticchio) several times regarding different contractors who examined the building for the purpose of obtaining information for the purpose of estimating the cost to remove the equipment from the building.

[19] In the fall of 2003, Boudreau entered preliminary negotiations with Sergio (Monticchio) regarding the possible sale of the land and building to the defendant

but no agreement was reached. Mr. Boudreau in oral evidence before the court on October 26th, testified that he had asked Sergio Monticchio by telephone what his intentions were with regards to the equipment and stated that Sergio declined to advise him of what his intentions were.

[20] Anthony DiFrancesco's affidavit states that he retained Golods to act as his bidding agent at the auction and that he only retained the defendant to act as an intermediary to complete the sale after he was advised by Woody's Auction Limited that he would need to tender Canadian funds.

[21] Mr. DiFrancesco was cross-examined with respect to his role with the defendant. While acknowledging that he was one of two directors and secretary of the Company, he testified that he did not know if he was a shareholder of the defendant or who the shareholders of the company were. He also testified that he arranged with the defendant for removal of the equipment from Boudreau's premises and to get "what I need" delivered to his property in Pennsylvania.

[22] Mr. DiFrancesco was questioned regarding his business enterprises. His only U.S. business was a substantial mushroom growing enterprise. He did not own any

peat bogs, or process peat, or sell peat to third parties; he purchased peat moss to mix with other ingredients and use in connection with his mushroom business.

[23] Sergio Monticchio of Richmond Hill, Ontario, president of the defendant, was cross-examined on his affidavit. The defendant Company was involved in the purchase of peat moss from owners of peat bogs and reselling it. He stated that the defendant was not the buyer of the equipment but solely facilitating payment on behalf of Mr. DiFrancesco, whose money paid for the equipment.

[24] On cross-examination, he confirmed that he was the president and a director of the defendant but he was unable to advise the court as to who were shareholders in the Company and whether or not Mr. DiFrancesco was a shareholder or who the other shareholders may be, or how many of the shares in the Company he owned. He confirmed that the company had three employees, himself, a lady named “Kashmir” and a third employee who arranged for the trucking of peat. He testified that he had been retained by Mr. DiFrancesco on July 10th to facilitate the payment of the purchase price for the equipment and that subsequent to that date Mr. DiFrancesco had hired him to arrange for the removal of the equipment from the Boudreau's building.

ANALYSIS

[25] The onus is on Mr. DiFrancesco, on a balance of probabilities, to satisfy the court that the equipment purchased in the name of the defendant was purchased by the defendant solely as an agent for Mr. DiFrancesco; if Mr. DiFrancesco meets this burden, the parties acknowledge that the defendant had no interest in the equipment that could be sold under the execution order to satisfy the judgment of the plaintiff against the defendant.

[26] Mr. DiFrancesco has not satisfied that onus.

[27] Daniel Woodfield was not associated with the plaintiff, defendant, or third party. The affidavit of Daniel Woodfield establishes that Golods first represented himself to the auctioneer as representing the defendant and not Mr. DiFrancesco. This contradicts the evidence of Mr. DiFrancesco that Golods was his personal agent and that he only retained the defendant to facilitate the purchase after he was advised by the auctioneers that receiving payment from the U.S. would be too slow and not acceptable. The evidence of the auctioneer leads me to believe that, while Mr. DiFrancesco was financing the purchase of the equipment, it was not for

himself but rather for the defendant. The evidence of Daniel and Beverley Woodfield and the documents prepared by them and delivered to the defendant and to Golods all clearly identified the defendant as the purchaser. The only independent evidence that the purchase was made on behalf of Mr. DiFrancesco was the evidence of Beverley Woodfield that Mr. DiFrancesco contacted her in August, 2004 (after the execution order had resulted in the seizure of the equipment) requesting that she change the invoice to his name. The three prior invoices were all made to the defendant.

[28] The court accepts the affidavit evidence of Hector Boudreau that Golods advised him at the time of the sale that he was acting for the defendant and at no time mentioned the name of Mr. DiFrancesco as being his principal. This is not consistent with the evidence of the third party.

[29] During cross-examination both Mr. DiFrancesco and Mr. Monticchio were questioned with regards to the shareholdings of the defendant Company. The evidence given by both Mr. DiFrancesco and Mr. Monticchio with respect to the shareholdings of the Company was vague and noncommittal. Even though they are the only officers and directors of the Company neither could remember who the

shareholders of the Company were and whether or not Mr. DiFrancesco was a shareholder of the Company and, if so, how much of the Company he owned. I was not satisfied that Mr. DiFrancesco and Mr. Monticchio had no knowledge of the shareholdings of the Company or whether Mr. DiFrancesco had a significant interest in the company.

[30] There was an onus on Mr. DiFrancesco, not only to show that it was his money that paid for the equipment, but that it was his intention that the equipment was being purchased by him as opposed to by the defendant in which Company he was one of two officers and directors and in which he was possibly a shareholder.

[31] Mr. Golods was either an agent for the defendant or Mr. DiFrancesco. No affidavit was filed from him by the third party. Evidence from him might have been helpful in discharging the onus on the third party.

[32] While some of the equipment described during the hearing would no doubt be useful to Mr. DiFrancesco in his mushroom growing business, the court is satisfied that much of the equipment had no relevance to his mushroom business, and had no other useful purpose than in compressing and processing peat moss.

[33] It was of some concern to the court that only in August of 2004 after the execution order had been put in place, was the auctioneer approached to change the records with respect to the purchaser of the equipment of the auction.

CONCLUSION

[34] Anthony DiFrancesco has failed to discharge the burden of showing on a balance of probabilities that the defendant was acting merely as his agent for the purchase of the equipment. The court finds that the equipment is the equipment of the defendant.

[35] The court awards costs of this application to the plaintiff in the amount of \$1,500.00 plus his costs to be taxed.

Gregory M. Warner, J.